## INDEX TO APPENDIX

Opinion, Third District Court of Appeal ..... 12
Trial Court Order on Final Hearing ..... 24
Per Curiam Opinion of Florida Supreme Court ..... 27
Complaint ..... 28
Answer ..... 30
Pertinent Parts of Collective Bargaining Agreements ..... 34
Pepsi's Expert Witness Testimony ..... 38
Pepsi's Comptroller Testimony ..... 39
Pepsi's Personnel Manager Testimony ..... 42
Plaintiffs' Testimony ..... 43
Plaintiffs' Expert Witness and Exhibit ..... 45
Section 7, Fair Labor Standards Act ..... 49
Names of Individual Plaintiffs ..... 50

Case No. 80-2172

**IN THE DISTRICT COURT OF APPEAL OF FLORIDA**
**THIRD DISTRICT**
**JULY TERM, A.D. 1981**

SOUTH FLORIDA BEVERAGE CORPORATION,
*Appellant,*

vs.

EFRAIN FIGUEREDO, et al.,
*Appellees.*

Opinion filed December 22, 1981.

An Appeal from a non-final order from the Circuit Court for Dade County, Herbert M. Klein, Judge.

Hogg, Allen, Ryce, Norton & Blue and W. Reynolds Allen and Lewis E. Shelley, for appellant.

Kanner, Brown & Lambert and Richard Kanner, for appellees.

Before BARKDULL, SCHWARTZ and NESBITT, JJ.

SWARTZ, Judge.

The South Florida Beverage Corporation appeals from a non-final order, rendered after a bench trial, which held it liable to the plaintiffs, 63 of its present and former employees, for failure to make overtime compensation payments allegedly required by the Fair Labor Standards Act, 29 U.S.C. §201, *et seq.*[1] Because we find that the appellant was, as a matter of law, in full compliance with the terms of the statute, we reverse the order under review and direct the dismissal of the complaint.

South Florida does business as the Pepsi-Cola Bottlers of Miami; the plaintiffs worked for the company as route drivers between June 8, 1976 and March 2, 1979. This dispute concerns

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1. Since the order, which referred the calculation of damages to a master, determined the issue of liability in favor of parties seeking affirmative relief, we have jurisdiction under Fla.R.App.P. 9.130(a)(3)(C)(iv).

the determination of the employee-plaintiffs' "regular rate" of pay during that period under the requirement of §207(a)(1) of the FLSA that

> no employer shall employ any of his employees...for a workweek longer than forty hours, unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.[2]

More specifically, the issue is whether the regular rate is correctly computed by dividing each employee's stipulated weekly salary by forty—so that, for example, the "regular rate" of a driver employed for $240.00 per week who worked forty-eight hours would be $6.00, requiring an additional $9.00 to be paid for each of the eight hours above forty, or $72.00; or by dividing the salary by the hours actually worked during the week. In the hypothetical situation this would yield a "regular rate" of $5.00 and require an additional payment of half of that for each extra hour over forty hours, or a total of $20.00. The latter method was the one actually employed by Pepsi, and accepted by the drivers and their union without complaint for virtually[3] the whole period in question. Based, however, almost entirely upon a single clause in their collective bargaining agreement,[4] the plaintiffs argued and the

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2. The appellant challenges the trial court's finding that it was subject to the FLSA. The basis of our decision permits us to assume without directly deciding the correctness of this conclusion. See, 29 U.S.C. §203(s); *Roland Electric Co. v. Walling*, 326 U.S. 657, 66 S.Ct. 413, 90 L.Ed. 383 (1946); *D.A. Schulte, Inc. v. Gangi*, 328 U.S. 108, 66 S.Ct. 925, 90 L.Ed. 1114 (1946); *Wirtz v. Standard Container and Paper Co.*, 389 F.2d 134 (5th Cir. 1967); *Wirtz v. Soft Drinks of Shreveport, Inc.*, 336 F.Supp. 950 (W.D.La. 1971).

3. See note 6, *infra*.

4. The relevant provisions of the agreement between the appellant and the United Steelworkers local which represented the appellees are as follows:

ARTICLE VI
HOURS OF WORK AND OVERTIME

Section 1.

*The regular work week shall be FORTY (40) HOURS* consisting of five consecutive eight hour days beginning on Monday and ending on

trial judge ruled that the former, or the fixed rate-fixed hours method, was required by the FLSA. Because the employees were, in fact, paid on a flat-sum-per-day-regardless-of-hours-worked basis which rendered the method of computation of overtime adopted by the parties the appropriate one under the applicable law, we hold that this conclusion was wrong.

The polestar in the determination of the "regular rate" question is the reality of the particular situation, that is, what hours and methods of pay were adopted "in actual fact" by the employer and employee. In an early and often-repeated interpretation of this provision of the FLSA, the Supreme Court so held in *Walling v. Youngerman-Reynolds Hardwood Co.*, 325 U.S. 419, 65 S.Ct. 1242, 89 L.Ed. 1705, 1710 (1945):

> The regular rate by its very nature must reflect all payments which the parties have agreed shall be received regularly during the workweek, exclusive of overtime payments. It is not an arbitrary label chosen by the parties; it is an actual fact. Once the parties have decided upon the amount of wages and the mode of payment the determination of the regular rate becomes a matter of mathematical computation, the result of which is unaffected by any designation of a contrary 'regular rate' in the wage contracts.

Accord, e.g., *Bay Ridge Operating Co. v. Aaron*, 334 U.S. 446, 461, 68 S.Ct. 1186, 92 L.Ed. 1502 (1948); *149 Madison Avenue*

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Friday. The regular starting time for employees covered hereunder shall be between 6:00 a.m. and 7:00 a.m. (with the exception of special events employees, whose regular starting time shall be 7:30 a.m.).

* * *

Section 3.

Overtime shall be payable as follows:

Salaried pre-sell drivers shall receive, for all hours worked in excess of forty (40) in a given workweek, overtime pay in accordance with the procedure outlined in Interpretive Bulletin Section 778.114 of the Wage and Hour Administrator, entitled "Fixed Salary for Fluctuating Hours."

All other employees covered hereunder will be compensated as provided elsewhere in this Agreement.

The emphasized clause is the one relied upon by the appellees and the lower court.

*Corp. v. Asselta*, 331 U.S. 199, 67 S.Ct. 1178, 91 L.Ed. 1432 (1947). In this case, the "actual facts" of the wage-and-hour circumstances of the Pepsi-Cola drivers appear with crystal clarity. Because of the wide disparities in, among other things, their daily duties and the lengths of their routes, the time required of these employees varied considerably from person to person, week to week, and day to day. The parties adopted a *modus operandi* to reflect and compensate for these fluctuations. Under it, a driver received a guaranteed payment of one-fifth of his designated weekly salary for each weekday he reported for work no matter how many hours he worked on that particular day. If he worked for more than forty hours during the five day workweek,[5] the overtime required by the FLSA was determined, as has been indicated, by dividing the designated weekly salary by the hours worked during that week and adding fifty percent of the result for each of the hours over forty.[6] The following two actual examples illustrate the process:

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5. Soon after the beginning of the pertinent period, the union and Pepsi also agreed to pay a driver one-fifth of his weekly salary for each Saturday he reported. The number of hours worked on Saturday was, by agreement, not tallied or computed in determining the total workweek for overtime purposes, apparently because it was thought that the full day's allowance for these hours was more than sufficient to compensate for any time-and-a-half over 40 hours the Saturday time would have required. Although they so argued below, the appellees did not carry their required burden to *show*, whether by their own testimony, cf. *Mitchell v. Mitchell Truck Line, Inc.*, 286 F.2d 721 (5th Cir. 1961) or otherwise, that this was not the case and that they were therefore entitled to any additional compensation for Saturday work. *Hodgson v. A.W. Crossley, Inc.*, 365 F. Supp. 1131 (S.D.N.Y. 1973). See also, 29 U.S.C. §207(e)(6)(premium Saturday pay not included in "regular rate.")

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6. In 1978, the union and the employer agreed to pay "straight time," or 1/40 of the agreed weekly wage, for every hour over 40 worked during weekdays. In the $240.00 per week-48 hours example in the text, this resulted in the payment of $40.00 additional for overtime. While this was less than the amount the appellees argued was required under the 40-hour, fixed hours-fixed salary method the trial court found was appropriate, it was more than we find *infra* was required by the FLSA under the "actual facts."

1. Plaintiff "A"—contractual salary of $220.00 per week.

| | Hours worked | |
|---|---|---|
| Monday | 8.22 | |
| Wednesday | 7.12 | |
| Thursday | 6.00 | |
| Friday | 6.44 | |
| Actual hours | 27.78 | |
| Actual pay: | 4 days | |
| | × $44.00 | per day (1/5 |
| | $176.00 | of $220.00) |

2. Plaintiff "B"—contractual salary of $244.00 per week.

| | Hours worked | |
|---|---|---|
| Monday | 8.95 | |
| Tuesday | 8.20 | |
| Wednesday | 9.42 | |
| Thursday | 7.88 | |
| Friday | 8.76 | |
| Actual hours | 43.21 | |
| Actual pay: | 5 days | |
| | × $48.80 | (1/5 of $244.00) |
| | $244.00 | |
| Plus: | $244.00 | ÷ 43.21 = $5.65 per hour |
| | $ 5.65 | × ½ × 3.21 over- |
| | $ 9.05 | time hours |
| Total: | $253.05 | |

It is abundantly clear that this method of computing and paying overtime was in full accord with the requirements of §207(a), as authoritatively implemented by the relevant regulations of the Wage and Hour Division, Employment Standards Administration of the U.S. Labor Department and applied in the

controlling decisions. The situation involved here is precisely treated in 29 C.F.R. §778.112:

> If the employee is paid a flat sum for a day's work or for doing a particular job, without regard to the number of hours worked in the day or at the job, and if he receives no other form of compensation for services, *his regular rate is determined by totaling all the sums received at such day rates or job rates in the workweek and dividing by the total hours actually worked. He is then entitled to extra half-time pay at this rate for all hours worked in excess of 40 in the workweek.* [e.s.]

This result is exactly the same as the one applied in 29 C.F.R. §778.114 to the analytically identical but more common situation of a guaranteed or fixed *weekly* allowance for fluctuating hours:

> Section 778.114 Fixed salary for fluctuating hours.
>
> (a) *An employee employed on a salary basis may have hours of work which fluctuate from week to week and the salary may be paid him pursuant to an understanding with his employer that he will receive such fixed amount as straight time pay for whatever hours he is called upon to work in a workweek, whether few or many.* Where there is a clear mutual understanding of the parties that the fixed salary is compensation (apart from overtime premiums) for the hours worked each workweek, whatever their number, rather than for working 40 hours or some other fixed weekly work period, such a salary arrangement is permitted by the Act if the amount of the salary is sufficient to provide compensation to the employee at a rate not less than the applicable minimum wage rate for every hour worked in those workweeks in which the number of hours he works is greatest, *and if he receives extra compensation, in additon to such salary, for all overtime hours worked at a rate not less than one-half his regular rate of pay. Since the salary in such a situation is intended to compensate the employee at straight time rates for whatever hours are worked in the workweek, the regular*

*rate of the employee will vary from week to week and is determined by dividing the number of hours worked in the workweek into the amount of the salary to obtain the applicable hourly rate for the week. Payment for overtime hours at one-half such rate in addition to the salary satisfies the overtime pay requirement because such hours have already been compensated at the straight time regular rate, under the salary arrangement.* [e.s.][7]

The cases establish that these regulations reflect and embody the appropriate judicial resolution of controversies such as this. A large number which so hold are collected in *Yadav v. Coleman Oldsmobile, Inc.*, 538 F.2d 1206, 1207-08 (5th Cir. 1976):

> The magistrate arrived at his total due figure by applying the so-called 'fluctuating work week' formula. See 29 C.F.R. §778.114 (1975). This was correct and we affirm.
>
> An employee under 29 C.F.R. §778.114 who is 'employed on a salary basis may have hours of work which fluctuate from week to week and the salary may be paid pursuant to an understanding with his employer that he will receive such fixed amount as straight time pay for whatever hours he is

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7. The illustrations contained in subsection (b) are exactly equivalent to what occurred at Pepsi-Cola during the pertinent time:

> The application of the principles above stated may be illustrated by the case of an employee whose hours of work do not customarily follow a regular schedule but vary from week to week, whose overtime work is never in excess of 50 hours in a workweek, and whose salary of $80 a week is paid with the understanding that it constitutes his compensation, except for overtime premiums, for whatever hours are worked in the workweek. If during the course of 4 weeks this employee works 40, 44, 50, and 48 hours, his regular hourly rate of pay in each of these weeks is approximately $2, $1.82, $1.60, and $1.67, respectively. Since the employee has already received straight-time compensation on a salary basis for all hours worked, only additional half-time pay is due. For the first week the employee is entitled to be paid $80; for the second week $83.64 ($80 plus 4 hours at 91 cents, or 40 hours at $1.82 plus 4 hours at $2.73); for the third week $88 ($80 plus 10 hours at 80 cents, or 40 hours at $1.60 plus 10 hours at $2.40; for the fourth week approximately $86.72 ($80 plus 8 hours at 84 cents or 40 hours at $1.67 plus 8 hours at $2.51).

called upon to work in a work week, whether few or many.' It is clear from the record in this case that Ms. Yadav understood that she was to receive a straight salary of $1,000.00 per month for whatever hours she worked. Therefore, her regular rate of pay is determined by dividing the total wage by the total hours *actually worked* in each particular week. *Overnight Motor Transportation Co. v. Missel*, 316 U.S. 572, 579-581, 62 S.Ct. 1216, 86 L.Ed. 1682 (1942); *Brennan v. Lauderdale Yacht Basin, Inc.*, 493 F.2d 188, 191 (5th Cir. 1974); *Nunn's Battery & Electric Co. v. Goldberg*, 298 F.2d 516, 519 (5th Cir. 1962); *Warren-Bradshaw Drilling Co. v. Hall*, 124 F.2d 42, 44 (5th Cir. 1941), aff'd 317 U.S. 88, 63 S.Ct. 125, 87 L.Ed. 83 (1942). See also *Mumbower v. Callicott*, 526 F.2d 1183, 1187 (8th Cir. 1975); *Brennan v. Valley Towing Co., Inc.*, 515 F.2d 100, 104-111 (9th Cir. 1975); *Triple 'AAA' Co. v. Wirtz*, 378 F.2d 884, 887 (10th Cir.), cert. denied, 389 US. 959, 88 S.Ct. 338, 19 L.Ed.2d 364 (1967); *St. John v. Brown*, 38 F.Supp. 385, 389-390 (N.D. Tex. 1941); 29 C.F.R. §§778.109, 778.325-326 (1975); *cf. Wirtz v. Leon's Auto Parts Co.*, 406 F.2d 1250 (5th Cir. 1969); *Flores Hernandez v. Infanteria Thom McAn, Inc.*, 516 F.2d 1293, 1296 (1st Cir. 1975).

An application of the doctrine expressed in these authorities requires reversal here.

As has been indicated, the trial judge's ruling was, and on this record could have been based only upon the single isolated sentence in the collective bargaining agreement that "[t]he regular work week shall be FORTY (40) HOURS consisting of five consecutive eight hour days beginning on Monday and ending on Friday."[8] For several reasons, however, this provision does not serve to support the decision under review.

1. First, and most significant, even an express statement in a collective bargaining agreement or other employment contract may not, as we have seen, be permitted to control the entitlement to benefits under the "regular rate" provision of the FLSA. That

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8. See note 4, *supra*.

is a separate,[9] purely statutory question which is determined by what the parties do, not by what they say. See generally, *Barrentine v. Arkansas-Best Freight System, Inc.*, 101 S.Ct. 1437, 67 L.Ed.2d 641 (1981). In *Bay Ridge Operating Co. v. Aaron, supra,* the Court stated, in no uncertain terms:

> A vigorous argument is presented for petitioners by the International Longshoremens Association that a collectively obtained and administered agreement should be effective in determining the regular rate of pay but we think the words of and practices under the contract are the determinative factors infinding the regular rate for each individual.
>
> As the regular rate of pay cannot be left to a declaration by the parties as to what is to be treated as the regular rate for an employee, it must be drawn from what happens under the employment contract.[10]

334 U.S. at 463-64, 68 S.Ct. at 1196, 92 L.Ed. at 1516-17. Since "what happened" under this agreement conclusively shows the propriety of the employer's overtime payments, any contrary language in the agreement is essentially irrelevant.

2. Even acknowledging that the contract is to be given some weight in determining the "actual facts" of the regular rate, see *Barrentine v. Arkansas-Best Freight System, Inc., supra; Bay Ridge Operating Co. v. Aaron, supra,* the language upon which the plaintiffs rely is insufficient to support the result reached below. This is shown by an application of the most elementary principles of contract construction.

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9. The plaintiffs themselves have *sub silentio* recognized the distinctiveness of the issues. Although many of them are the union leaders who were active in negotiating the contract, they do not claim in this action — and in fact have never contended, by invoking its arbitration provisions or otherwise — that the appellant has not paid the wages required by the terms of the collective bargaining agreement itself.

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10. It is true that the "actual facts" test was applied in *Aaron*, as in most, if not all, other instances to *increase* the return to employees above the amount due under what was designated as the "regular rate" in the contract. We are unwilling to believe, however, that the doctrine is not a neutral principle which must be applied even though, as here, it may have the opposite effect.

(a) It is apodictic that, in determining the intention of the parties, individual terms of a contract are not to be considered in isolation, but as a whole and in relation to one another, with specific language controlling the general. *Hollerbach v. U.S.*, 233 U.S. 165, 34 S.Ct. 553, 58 L.Ed. 898 (1914); *Bystra v. Federal Land Bank of Columbia*, 82 Fla. 472, 90 So. 478 (1921); *4 Williston on Contracts* §618 (3rd ed. 1961). Viewed in this light, the forty-hour provision simply does not mean—or even say—what the court held it did. Indeed, it does not even speak to the real issue in the case—the "regular *rate*" of the drivers. Instead, it provides only that the "regular *work week*" is forty hours, and may thus properly be viewed as merely declaratory of and meaninglessly redundant to what the FLSA already provides insofar as overtime pay is concerned.[11] More important, two paragraphs later,[12] the parties directly addressed the "regular rate"-overtime question. Compare *Mumbower v. Callicott*, 526 F.2d 1183, 1188 (8th Cir. 1975). They did so by providing, first, that it was to be governed by the "procedure outlined in . . . Section 778.114"—the fluctuating hours standard which has already been quoted—and subsequently, see note 6, *supra*, by the payment of "straight time" for overtime hours. Both methods are totally inconsistent with the position adopted below, that the parties agreed to pay the designated salary for a fixed forty-hour workweek, so that the "regular rate" was simply the salary divided by forty. Even on the face of the contract alone, there is therfore nothing to support that conclusion.

(b) The proper resolution of any inconsistency which may *arguendo* exist in this agreement, like any other, is best determined by the manner in which the parties actually performed under it. *Brooklyn Life Ins. Co. of New York v. Dutcher*, 95 U.S. 269, 24 L.Ed. 410 (1877); *Lalow v. Codomo*, 101 So.2d 390, 393

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11. This view is strengthened by the fact that, soon after the contract was executed, it was agreed in a supplementary letter that, after the first six weeks, "the company will not schedule an employee to work a regular work week in excess of *fifty (50)* hours." [e.s.]

12. See note 4, *supra*.

(Fla. 1958); *4 Williston, supra,* §623. As to this important factor, there is no doubt that everyone, without issue, dispute, or complaint, treated the agreement as one which called for the overtime specifically agreed to, not the one required by the *ex post facto* application of the "forty hour work week" clause.

(c) Finally, subsequent to the time frame involved here—during which there was one amendment to the overtime practice, see note 6, *supra*—the employer and union, after intensive collective bargaining, further changed the contract to a straight hourly rate. This resulted in the same consequences as to overtime pay which the trial court's decision would have applied to the previous period. It may be presumed, however, that an amendment to an agreement is designed to serve some useful function, and its existence is strong evidence, therefore, that the contract was changed from what the parties believed and intended was provided before. See *Brewster v. Gage,* 280 U.S. 327, 50 S.Ct. 115, 74 L.Ed. 457, 463 (1930); *State ex. rel. Triay v. Burr,* 79 Fla. 290; 84 So. 61, 74 (1920).

The determination of the "regular rate" of pay is, as the Supreme Court has recently reiterated, a mixed question of law and fact. *Barrentine v. Arkansas-Best Freight System, Inc., supra,* 101 S.Ct. at 1446, 67 L.Ed.2d at 655. For the reasons we have outlined, an application of the facts shown by the record to the controlling law demonstrates the incorrectness of the order below. See cases collected, 51B C.J.S. Labor Relations §1310 (1968). It is therefore reversed and the cause remanded with directions to dismiss the complaint.[13]

Reversed.

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13. We need not discuss the other issues presented by the appellant.

**IN THE DISTRICT COURT OF APPEAL OF FLORIDA**
**THIRD DISTRICT**
**JANUARY TERM, A.D. 1982**

Tuesday, February 9, 1982

SOUTH FLORIDA BEVERAGE CORPORATION,
*Appellant,*

vs.

EFRAIN FIGUEREDO, et al.,
*Appellees.*

Counsel for appellees having filed in this cause motion for rehearing and same having been considered by the court which determined the cause, it is ordered that said motion be and it is hereby denied.

Case No. 79-9888 (04)

IN THE CIRCUIT COURT OF THE
11TH JUDICIAL CIRCUIT
IN AND FOR DADE COUNTY, FLORIDA

GENERAL JURISDICITION DIVISION

EFRAIN FIGUEREDO, et al.,
*Plaintiffs,*

v.

SOUTH FLORIDA BEVERAGE CORPORATION,
*Defendant.*

## ORDER ON FINAL HEARING

THIS CAUSE came on for final hearing before the Court to determine whether the Defendant SOUTH FLORIDA BEVERAGE CORPORATION has violated the overtime pay provisions of the Fair Labor Standards Act, 19 U.S.C. Section 201 et seq. The Court having heard the testimony and examined the exhibits offered in evidence, finds the following:

## FINDINGS OF FACT

1. The Defendant SOUTH FLORIDA BEVERAGE CORPORATION is a Florida corporation doing business as Pepsi-Cola Bottlers of Miami. Its gross sales exceed $250,000.00 annually and it engages in business outside the State of Florida.

2. The Plaintiffs were hired in accordance with the terms of written employment agreements, entered in July of 1975 and again in July of 1978, each of which provides that the regular work week is forty hours, consisting of five consecutive eight-hour days and for weekly fixed pay.

3. The Defendant's calculation of wages for work in excess of forty hours between June 8, 1976 and March 2, 1979, was based on the assumption that daily wages equal to one-fifth of the weekly wage stated in the contract was to cover all of the hours which Plaintiffs were required to work during the day.

4. The Defendant was aware of the existence of the Fair Labor Standards Act and its application to them and the Plaintiffs when both of the employment contracts were made, as well as during the time periods pertinent hereto.

5. Plaintiffs were paid one-fifth of their weekly salary for work performed on Saturday in accordance with a written agreement made between the parties, amending the first employment contract and continuing in practice through March 2, 1979. The Plaintiffs did not clock in or out on Saturdays, and such time was not computed in determining overtime accumulated by Plaintiffs. Each Plaintiff who worked Saturday is assumed to have worked eight hours.

6. The normal non-overtime work period established by the Defendant for these Plaintiffs was eight hours in a day and forty hours in a week.

7. The "regular rate" for each Plaintiff is his weekly pay specified in the employment agreements divided by 40.

## CONCLUSIONS OF LAW

8. This Court has jurisdiction over the parties and the subject matter of this Complaint.

9. The Defendant is subject to the provisions of the Fair Labor Standard Act 29 U.S.C. Section 201 et seq.

10. The Defendant has violated the Fair Labor Standards Act 29 U.S.C.A. Section 107 by not paying Plaintiffs overtime compensation based on their "regular rate," as that term is legally defined.

11. Defendant's violation was willful as that term has been interpreted in construing the Fair Labor Standards Act.

12. The Defendant has failed to establish its burden of proving: (1) that it acted in good faith and (2) had reasonable grounds for believing its acts and omissions were not a violation of the Act.

13. The fourth affirmative defense of laches and estoppel,

the seventh affirmative defense of Plaintiffs' failure to file grievances and exhaust their remedies provided by the collective bargaining agreements, the eighth affirmative defense that Plaintiffs are exempt executive or administrative employees, the ninth affirmative defense that Plaintiffs were exempt pursuant to the Motor Carrier exemption, the tenth affirmative defense that Plaintiffs were exempt outside salesmen are all either insufficient as a matter of law or Defendants failure to offer evidence in their support.

14. The Defendant's payment of one-fifth the Plaintiffs' weekly salary for Saturday work does not constitute a premium payment as defined in the Act.

WHEREFORE, RAY MARIN

is appointed Special Master in this cause. The Master shall compute the weekly wage earned by the individual Plaintiffs during each week, between June 8, 1976, and March 2, 1979, that they worked for more than forty hours, utilizing the criteria set forth in this Judgment. From these wages earned by the individual Plaintiffs during their overtime weeks, the Master shall deduct the actual wages paid those Plaintiffs during those weeks and report to the Court the amount of overtime wages still due each individual Plaintiff. The Master's fee and costs are to be borne by the Defendant.

The Court reserves jurisdiction to enter a Judgment against the Defendant in favor of each Plaintiff for the amount of unpaid overtime compensation due each Plaintiff as found by the Master, plus an equal amount as liquidated damages, plus interest from the date of this Judgment.

The Court reserves jurisdiction to award Plaintiffs' attorneys Richard Kanner and Carl M. Lambert, a Judgment for Attorneys' Fees for bringing this action, and for costs.

DONE AND ORDERED in Chambers at Miami, Dade County, Florida, this 10 day of October, 1980.

HERBERT M. KLEIN, Circuit Judge

**Case No. 61,749**

**SUPREME COURT OF FLORIDA**

Friday, May 28, 1982

EFRAIN FIGUEREDO, et al.,
*Petitioners,*

vs.

SOUTH FLORIDA BEVERAGE CORPORATION,
*Respondent.*

This cause having heretofore been submitted to the Court on jurisdicitonal briefs and portions of the record deemed necessary to reflect jurisdiction under Article V, Section 3(b), Florida Constitution (1980), and the Court having determined that it should decline to accept jurisdiction, it is ordered that the Petition for Review is denied.

No Motion for Rehearing will be entertained by the Court. See Fla. R. App. P. 9.330(d).

The Motion for Attorney's Fee filed by attorney for petitioners is hereby denied.

BOYD, OVERTON, ALDERMAN and McDONALD, JJ., Concur
ADKINS, ACTING C.J., Dissents

## SECOND AMENDED COMPLAINT
(Caption Omitted)

Plaintiffs allege.

1. This is a class action complaint to recover damages for the defendant's violation of the Fair Labor Standard's Act 29 U.S.C.A. §201 et seq. Damages exceed $2,500.

2. The defendant is a Florida corporation doing business as Pepsi-Cola Bottling of Miami, and is an enterprise engaged in commerce in Dade County, as that term is defined in 29 U.S.C.A. §203 in that defendant is an enterprise (other than an enterprise which is comprised exclusively of retail or service establishments) whose annual gross volume of sales made or business done during all times material to this complaint exceeds $250,000 exclusive of excise taxes at the retail level which are separately stated.

3. The plaintiffs have been employed by the defendants during the past three years to deliver pre-sold beverages to various retailers in South Florida and, accordingly, come within the Act's definition of "employee," 29 U.S.C.A. §203.

4. The plaintiffs have been employed by the defendant during the past three years at an average wage of $250 for forty hours work a week, and these plaintiffs have worked, in addition to forty hours a week, an average in excess of five hours per week during this time.

5. The defendant, for the past three years, have violated the Fair Labor Standard's Act, 29 U.S.C.A. §207 by not paying plaintiffs and those other employees similarly situated, wages for employment in excess of forty hours, calculated at a rate of not less than one and one-half times the plaintiffs' regular rate of compensation.

6. The defendant's withholding of applicable overtime compensation during the past three years has been willful and in bad faith.

WHEREFORE plaintiffs pray to recover unpaid overtime compensation and interest accrued thereon for the three years preceding the filing of this complaint, and an equal amount of liquidated damages, a reasonable attorney's fee, and costs incurred in this action, and trial by jury.

(Certificate of Service and Signature Omitted)

**SUPPLEMENT TO SECOND AMENDED COMPLAINT**
(Caption Omitted)

Plaintiff supplements paragraph 2 of the Second Amended Complaint so that the third line thereof will now state "In Dade County, and various countries in the Caribbean and Latin and Central America."

(Certificate of Service and Signature Omitted)

## DEFENDANT'S ANSWER AND DEFENSES
(Caption Omitted)

COMES NOW the Defendant, SOUTH FLORIDA BEVERAGE CORPORATION, pursuant to Rule 1.140 of the Florida Rules of Civil Procedure and files these its Answer and Defenses to the Second Amended Complaint, as to each individual Plaintiff, as follows:

1. The Defendant denies the allegations in Paragraph No. 1.

2. As to the allegations in Paragraph No. 2 of the Second Amended Complaint, the Defendant admits that it is a Florida corporation doing business as Pepsi-Cola Bottling Company of Miami and that it does business in Dade County, Florida and with various other countries in Latin America and that its annual gross volume of sales made or business done exceeds $250,000.00. The Defendant denies all other allegations contained in Paragraph No. 2.

3. As to the allegations in Paragraph No. 3 of the Second Amended Complaint, the Defendant admits that some of the named Plaintiffs have been employed by the Defendant for some of the time covered by the Second Amended Complaint. The Defendant denies all other allegations in Paragraph No. 3.

4. As to the allegations contained in Paragraph No. 4 of the Second Amended Complaint, the Defendant states that it is without knowledge.

5. The Defendant denies all allegations in Paragraph No. 5 of the Second Amended Complaint.

6. The Defendant denies all allegations contained in Paragraph No. 6 of the Second Amended Complaint.

7. As its first affirmative defense, the Defendant claims that all of the Plaintiffs employed by it were paid the overtime to which the were entitled, if any, under §7 of the Fair Labor Standards Act (29 U.S.C. §207), and the administrative regulations and interpretations thereof.

8. As its second affirmative defense, the Defendant claims that it paid overtime compensation to the Plaintiffs based pursuant to 29 U.S.C. §259, on a good faith reliance on advice of the Secretary of Labor or his agents in the form of official Wage/Hour Administrative Opinions, Interpretive Bulletins or on court cases under the FLSA which indicated or obviously implied that the overtime pay practices of which the Plaintiffs complain, were in fact legal and in compliance with the Fair Labor Standards Act.

9. As its third affirmative defense, the Defendant claims that any violation of the Fair Labor Standards Act was not intentional but was inadvertent, accidental and based on Defendant's good faith understanding of the requirements of the Fair Labor Standards Act and not for the purpose of denying any of the Plaintiffs their rights under the FLSA.

10. As its fourth affirmative defense, the Defendant claims that the Plaintiffs, and each of them, are barred in this case by laches and estoppel.

11. As its fifth affirmative defense, the Defendant claims that even if it is obligated for certain unpaid overtime for some of the named Plaintiffs, that all such obligations are restricted to a period no earlier than two years prior to the time each Plaintiff effectively commenced this lawsuit, under provisions of Section 6 of the Portal-To-Portal Act (29 U.S.C. §255), since any failure by the Defendant was not a willful violation.

12. As its sixth affirmative defense, the Defendant claims that even if it is obligated for certain unpaid overtime for certain of the named Plaintiffs, that pursuant to 29 U.S.C. §260, such Plaintiffs are not entitled to liquidated damages on such unpaid overtime since any failure by the Defendant was in good faith and based on reasonable grounds for believing that its act or omission was not a violation of the Fair Labor Standards Act.

13. As its seventh affirmative defense, the Defendant claims that the Plaintiffs are barred for failing to file grievances and pursue and exhaust the remedies provided such Plaintiffs under their collective bargaining agreements with the Defendant.

14. As its eighth affirmative defense, the Defendant claims that some or all of the Plaintiffs were exempt executive or administrative employees within the meaning of Section 13(a)(1) of the Fair Labor Standards Act, for some or all of the period of time covered by this lawsuit, and that the Defendant is therefore entitled to any exemption from the overtime requirements of the FLSA for such Plaintiffs.

15. As its ninth affirmative defense, the Defendant claims that some or all of the Plaintiffs for some or all of the time period covered by this lawsuit were exempt from the overtime provisions of the FLSA purusant to the motor carrier exemption, 29 U.S.C. §213(b)(1).

16. As its tenth affirmative defense, the Defendant claims that some or all of the Plaintiffs for some or all of the time period covered by this lawsuit, were outside salesmen, exempt from the overtime provisions of the FLSA purusant to 29 U.S.C. §213(a)(1).

17. As its eleventh affirmative defense, the Defendant states that each Plaintiff was paid in full pusuant to collective bargaining agreements between the Defendant and United Steelworkers of America and its Local Union 8430, the exclusive bargaining agent for all of the Plaintiffs.

18. As its twelfth affirmative defense, the Defendant states that some or all of the Plaintiffs' claims are barred by the statute of limitations which is two years prior to the date of the Supplement to the Second Amended Complaint, or in the alternative two years prior to the date of the First Amended Complaint, or in the alternative the date of the original Complaint for the four original Plaintiffs and the date of the other Plaintiffs filed their consent to become party plaintiffs.

19. As its thirteenth affirmative defense, the Defendant states that this Court is without jurisdiction over some or all of the Plaintiffs, the amount in controversy being insufficient to invoke this Court's jurisdiction.

20. As its fourteenth affirmative defense, the Defendant states that this Court is without jurisdiction over this case as a

class action since there is no necessity for bringing this action as a class action, the class has not been described with any degree of certainty, the Plaintiffs do not adequately represent the class and the interest of the Plaintiffs are not coextensive with the interests of any class members. Since each Plaintiff must consent to become a named Plaintiff before participating in this lawsuit, under the FLSA there is no viable class action.

21. As its fifteenth affirmative defense, the Defendant states that even if it is obligated for certain unpaid overtime compensation, this Court is without authority to award interest on such monies under the FLSA.

(Certificate of Service and Signature Omitted)

## 1975 COLLECTIVE BARGAINING AGREEMENT

### HOURS OF WORK AND OVERTIME

Section 1.

The regular work week shall be FORTY (40) HOURS consisting of five consecutive eight hour days beginning on Monday and ending on Friday. The regular starting time for employees covered hereunder shall be between 6:00 a.m. and 7:00 a.m. (with the exception of special events employees, whose regular starting time shall be 7:30 a.m.).

• • •

Section 3.

Overtime shall be payable as follows:

Salaried pre-sell drivers shall receive, for all hours worked in excess of forty (40) in a given workweek, overtime pay in accordance with the procedure outlined in Interpretive Bulletin Section 778.114 of the Wage and Hour Administrator, entitled "Fixed Salary for Fluctuating Hours."

### WAGES

| | Effective July 28, 1975 | Effective July 26, 1976 | Effective July 25, 1977 |
|---|---|---|---|
| PRE SELL/ TELL SELL DRIVERS | | | |
| After 30 days | $210.00 | $220.00 | $230.00 |
| After 3 years | $230.00 | $240.00 | $250.00 |
| After 5 years | $250.00 | $260.00 | $270.00 |

• • •

### LONGEVITY INCREASE

Commencing with the signing of this Agreement, each employee shall receive after THREE (3) YEARS of continuous employment from his last date of hire, a longevity increase of ten cents (.10) per hour; after six (6) years of such continuous employment, then a further longevity increase of ten cents (.10) per hour. The amount of the longevity increase shall be computed on the basis of a 40 hour week; longevity increase will therefore be limited to $4.00 or [illegible]00 respectively, per week.

## REPORTING AND CALL-IN PAY

Section 1.

An employee reporting to work on a scheduled workday and at his regular scheduled reporting time without being notified (either by telegram, mail or personally), the previous day that there will be no work, shall receive the equivalent of four (4) hours pay at his regular hourly or guaranteed rate.

## 1978 COLLECTIVE BARGAINING AGREEMENT

### HOURS OF WORK AND OVERTIME

Section 1.

The regular work week shall be FORTY (40) HOURS consisting of five consecutive eight hour days beginning on Monday and ending on Friday. The regular starting time for employees covered hereunder shall be between 6:00 a.m. and 7:00 a.m. (with the exception of special events employees, whose regular starting time shall be 7:30 a.m.) and the regular work week for Bulk Merchandisers shall be forty (40) hours consisting of not more than five days to be schedule by management.

• • •

Section 3.

Overtime shall be payable as follows:

Route Merchandisers, Bulk Merchandisers and Bulk Tractor Trailer Drivers shall receive straight time pay for all hours worked in excess of forty (40) in a given workweek.

### WAGES

### ROUTE MERCHANDISERS

| | Base Pay | | |
|---|---|---|---|
| | July 24th. 1978 | July 23rd. 1979 | Oct. 1st. 1980 |
| After 30 working days | 240.00 | 250.00 | 260.00 |
| After 3 years | 269.00 | 279.00 | 289.00 |
| After 5 years | 303.00 | 313.00 | 323.00 |

### BULK MERCHANDISERS

| | Base Pay | | |
|---|---|---|---|
| | July 24th. 1978 | July 23rd. 1979 | Oct. 1st. 1980 |
| After 30 working days | 225.00 | 235.00 | 245.00 |
| After 3 years | 259.00 | 269.00 | 279.00 |
| After 5 years | 283.00 | 293.00 | 303.00 |

## REPORTING AND CALL-IN PAY

Section 1.

An employee reporting to work on a scheduled workday and at his regular scheduled reporting time without being notified (either by telegram, mail, telephone or personally), the previous day that there will be no work, shall receive the equivalent of four (4) hours pay at his regular hourly or rate.

## PEPSI'S EXPERT WITNESS

Q: Do you have an opinion with regard to the method by which the employer or the defendant paid the plaintiffs during this period of time?

A. I have an opinion.

Q. What is that opinion?

A. These employees were paid on a daily basis with overtime, daily overtime on multiples of eight, and weekly overtime over 40 hours.

* * *

THE COURT: Were they paid overtime also—I see, even when it was less than 40 hours, overtime was being paid; is that right—on multiples of eight hours per day?

THE WITNESS: Yes, sir.

THE COURT: And there is no statutory obligation to do that; is that what you are saying?

THE WITNESS: No, sir; not under the Fair Labor Standards Act.

THE COURT: Pepsi just did it as a generous gesture.

THE WITNESS: It is an inference that I can't support with anything in the record. I don't know whether there were instructions to that effect or whether it was just because of the computer programming. I just don't know.

**COMPTROLLER**

Q. Does Pepsi admit that Pespi was not obligated by the Fair Labor Standards Act or any other federal law to pay what Pepsi has labeled overtime for hours when the employees worked less than 40?

A. Yes.

Q. Does Pepsi admit in the computation of overtime hours for less than 40 that Pepsi used increments of eight hours to determine the number of overtime hours?

A. Yes, it is called a daily formula basis.

* * *

Q. Well, Pepsi considered eight or increments of eight hours as the standard by which overtime hours would be computed less than 40.

A. Yes.

* * *

BY MR. KANNER:

Q. Mr. Fleischer, the question is, in computing, in Pepsi computing their overtime wages under the second contract, do you admit that Pepsi did not compute overtime based on a fixed 40-hour week?

A. Yes, I do.

Q. Now, does Pepsi admit that neither of the plaintiffs nor their union representatives or union officers were ever advised in writing that the 40-hour provision that I have read in Section One was not being followed?

MR. ALLEN: I object except to the extent during the period he was employed and if he knows.

THE COURT: Answer the question as amended by your lawyer.

THE WITNESS: I don't know if they were advised in writing.

BY MR. KANNER:

Q. You admit that the plaintiffs or their union leaders were never advised by writing or orally, notifying them of the change in this contract on the bulletin board which is called for in the employment contract?

A. Are you referring to the method of calculating overtime pay?

Q. Yes.

A. I would say that they did understand it.

Q. I am not asking for your conclusions. I am asking you whether management personnel or lower-echelon supervisory personnel of Pespi Cola displayed on the bulletin board, which is discussed on Page 26 of this contract, the fact that the fixed 40 hours was not going to be used in computing overtime.

* * *

THE WITNESS: Could you repeat the question?

BY MR. KANNER:

Q. Were the plaintiffs or the union people ever advised on the company bulletin board about the fact that the company was not complying with the 40-hour provisions of the contract?

A. I don't know.

Q. Were the plaintiffs or their union representatives ever notified in any manner that the company was not complying with this Paragraph One, the 40-hour provision?

A. To the best of my knowledge, yes, in verbal conversations.

Q. By whom?

A. At the negotiations—in other words, when we talked about overtime, as an example, when you started half time and if you have time-and-a-half on the other end of the scale, and you agree to straight time—and I will say that Carlos Suarez, being a professional negotiator, I would presume he understood the compromise that we reached.

Q. Now, do you admit, Mr. Fleischer, that your lawyers have

not furnished me with a solitary document in response to my motion that they produce all of the documents you used to compute overtime computations; they have not given me a solitary document that contains any reference to a daily rate to compensate the plaintiffs for all of the hours that the plaintiffs were required to work in the day or week?

MR. ALLEN: I object.

THE COURT: Sustained as to the form of the question.

THE WITNESS: I have no idea what my attorney has given you or not given you.

* * *

BY MR. KANNER:

Q. What documents does Pepsi Cola have in its control and possession that show that Pepsi Cola, from July of '75 forward, was paying on a daily basis to cover all of the hours employed during the day.

A. The payroll records that we have.

Q. Anything else?

A. I would just say the documents that my attorneys have presented.

**PERSONNEL MANAGER**

Q. Through these duties at Pepsi Cola, did you learn what the normal work week was for the truck drivers?

A. When?

Q. After July of 1975.

A. Well, the normal work week was determined by the union agreement.

Q. Now, during the time that you were personnel director, did Pepsi hire any route merchandisers or truck drivers outside the terms of the union agreement?

A. What do you mean outside of the agreement, the union agreement? Could you be a little bit more specific, please?

Q. Did Pepsi Cola have an agreement, in addition to the union agreement for its truck drivers and route merchandisers?

A. No, sir. Pepsi Cola only had one union agreement.

* * *

THE WITNESS: Every time I hire an employee, I hire him according to the necessities of the company and within the prescriptions of the union agreement.

THE COURT: That is what you told the employees, that they were going to work under this union agreement?

THE WITNESS: No. Of course, I instruct the employees about the working conditions of the company and they could become, you know—because they have—they go on probation, like one month probation, for a period of a probation, and then they could become members of the local union.

THE COURT: The next question is, did you ever hire people on a daily basis?

THE WITNESS: No.

**PLAINTIFF**

THE COURT: Did you have any conversations touching and concerning any written agreements?

THE WITNESS: Yes.

THE COURT: Tell me what they were.

THE WITNESS: We were to work—I was to work for 30 days on a temporary basis. After 30 days of working, I would have to work under the conditions of the contract, the union contract what was then in existence.

* * *

Q. Who sets your schedule, the number of stops that you are to make every day?

A. This is done by the company.

Q. Are you given a list or anything?

A. You are given invoices, and each invoice has a sequence number; and dependent on how many cases they have going out that particular day, depends on how many stops you have.

* * *

Q. What was the company policy relative to you completing your assigned stops prior to coming in in the evening?

THE WITNESS: You were told you had to finish your route.

BY MR. KANNER:

Q. And after March of '79, had those instructions changed?

A. In certain instances, the company will instruct you to be in and punched out by a set time, 3:30 or whatever.

* * *

Q. Did you go down to the Wage-and-Hour Department and inquire about the method of pay?

A. Yes.

Q. Approximately when?

A. Approximately, I would say, about a little over a year ago.

* * *

Q. How soon after your visit to Wage-and-Hour did Pepsi begin paying time-and-a-half?

THE WITNESS: It was exactly the second Friday after the Monday that I went to Wage-and-Hour. I went to Wage-and-Hour on a Monday. The second Friday after this Monday, we started receiving time-and-a-half.

* * *

Q. Mr. Wells, from your previous examination of these records and your own independent recollection, how often would you work five days in a week and not work more than 40 hours?

A. Not any.

* * *

Q. Were you ever told by anyone representing Pepsi Cola that the terms of the agreement, written agreement, were changed as to the number of hours for which you were employed?

A. No.

## PLAINTIFFS' EXPERT

Q. Let me ask you about a daily salary. Do you have an opinion whether the defendant's payroll calculations during the first contract were predicated on a fixed daily salary for all hours that the truck drivers worked during the day?

A. You mean, a day rate, a fixed day rate?

No, I think I did point out that the day rate is a flat sum for a day's work without regard to the number of hours worked in the day or at the job.

In every case, the employee was paid the so-called day rate only for hours up to eight in a day.

Q. Now, during the second contract, Mr. Gillespie, which was in July of '78, do you have an opinion whether the defendant's payroll calculations during the second contract were calculated on a fixed daily salary, during the second contract.

A. No, they were predicated on an hourly rate, again, in the same fashion as in the previous period, except that here, in that second period they paid the full straight time for any overtime worked. They didn't attempt to break it down and pay a lower rate.

Q. Now, frequently, would the employees work for five days and not accumulate hours in excess of 40?

A. It would be very infrequently. In fact, I don't recall any instance in which a full five days may have been worked.

* * *

It is a variation of the fluctuating work week, but it does not comply with the fluctuating work week principle. The work week was in fact divided into a straight time and an overtime work week in which the 48 hours that was recorded as straight time and one-and-a-half regarded as overtime; whereas in fact, the employee had worked 49-and-a-half hours, so there were nine-and-a-half hours of overtime.

The splitting of the work week in that fashion is not regarded as compliance with the Wage and Hour regulations.

* * *

A. No. Specifically, if you wish, you can read an expert from 778.501. 778.501 deals with the split-day plan; and under this plan, the normal or regular work day is artificially divided into two portions, one of which is arbitrarily labeled the straight-time portion of the day, and the other the overtime portion, and that is just about what occurred here.

* * *

In this case, the day was broken down into a straight-time period of eight hours and anything over the eight was shown as overtime in this particular week.

The employee was paid, however, only for the four eight-hour days, 32 hours, at $176.00, and then the total of 44.53 hours was divided into that $176.00 in order to come up with an hourly rate which they then divided and paid half time on.

Now, actually, the employee was paid for only 32 hours rather than the full 44.53 before determining what the hourly or regular rate would be.

Here again, you have Section 778.315, that situation, in which all straight time must be paid before overtime can be claimed to be paid.

**Consolidation of transcriptions for Carlos Castro, with footnotes on sheet #2, explaining application of Regulations to each type of payment.**

| | | Method of Payment | | | Payment Legally Required | | |
|---|---|---|---|---|---|---|---|
| | | Week Ending 12/24/76 | | | | | |
| | | Base Salary $220.00 — Worked 49.5 Hours | | | | | |
| | | Hours | Rate | Paid | Hours | Rate | Due |
| See Notes a,b,c,d. | Straight-time(a) | 48(c) | 5.50 | 264.00(b) | 49.5 | 5.50 | 272.25 |
| | Overtime(b) | 1.5(d) | 2.665 | 3.98(d) | 9.5 | 2.75 | 26.13 |
| | Total | | | 267.98 | | | 298.38 |
| | Underpayment $30.40 | | | | | | |
| | | Week Ending 1/14/77 | | | | | |
| | | Base Salary $220.00 — Worked 44.53 Hours | | | | | |
| a,b,c,d, e,i. | Straight-time(c,a) | 32(i) | 5.50 | 176.00(b) | 44.53 | 5.50 | 244.92 |
| | Overtime(d) | 12.53 | 2.095 | 26.25(d) | 4.53 | 2.75 | 12.46 |
| | Total(e) | | | 202.25 | | | 257.38 |
| | Underpayment $55.13 | | | | | | |
| | | Week Ending 3/31/78 | | | | | |
| | | Base Salary $254.00 — Worked 62.82 Hours | | | | | |
| a,b,c,d. | Straight-time(a,c) | 48 | 6.35 | 304.80(b) | 62.82 | 6.35 | 398.91 |
| | Overtime(b,d) | 14.82 | 2.425 | 35.95(d) | 22.82 | 3.175 | 72.45 |
| | Total | | | 340.75 | | | 471.36 |
| | Underpayment $131.11 | | | | | | |
| | | Week Ending 6/2/78 | | | | | |
| | | Base Salary $254.00 — Worked 51.48 Hours | | | | | |
| a,b,f,i. | Straight-time(a,i) | 40 | 6.35 | 254.00(b) | 51.48 | 6.35 | 326.90 |
| | Overtime | | | —— | 11.48 | 3.175 | 36.45 |
| | Holiday Premium(f) | 8 | 6.35 | 50.80(f) | 8 | 6.35 | 50.80 |
| | Total(i) | | | 304.80 | | | 414.15 |
| | Underpayment $109.35 | | | | | | |
| | | Week Ending 6/30/78 | | | | | |
| | | Base Salary $254.00 — Worked 43.20 Hours | | | | | |
| a,b,h,i. | Straight-time(a,i) | 32 | 6.35 | 203.20(b) | 43.20 | 6.35 | 274.32 |
| | Overtime | | | | 3.20 | 3.175 | 10.16 |
| | Sick Pay(h) | 8 | 6.35 | 50.80(h) | 8 | 6.35 | 50.80 |
| | Total | | | 254.00 | | | 335.28 |
| | Underpayment $81.28 | | | | | | |

| | | Method of Payment | | | Payment Legally Required | | |
|---|---|---|---|---|---|---|---|
| | | Week Ending 7/28/78 | | | | | |
| | | Base Salary $269.00 — Worked 42.01 Hours | | | | | |
| | | Hours | Rate | Paid | Hours | Rate | Due |
| a,b,c,d, | Straight-time(a,c) | 32 | 6.725 | 215.20(b) | 42.01 | 6.725 | 282.52 |
| j. | Overtime(d,j) | 10.01 | 6.725 | 67.32 | 2.01 | 3.36 | 6.75 |
| | Anniversary Pay | | | 53.80 | | | 53.80 |
| | Total | | | 336.32 | | | 343.07 |
| | Underpayment $6.76 | | | | | | |
| | | Week Ending 8/4/78 | | | | | |
| | | Base Salary $269.00 — Worked 48.51 Hours | | | | | |
| a,b,c,d, | Straight-time(a,c) | 40 | 6.725 | 269.00(b) | 48.51 | 6.725 | 326.23 |
| j. | Overtime(d,j) | 8.51 | 6.725 | 57.23 | 8.51 | 3.3625 | 28.62 |
| | Total | | | 326.23 | | | 354.85 |
| | Underpayment $28.61 | | | | | | |

(*a*) —Record shows payment at hourly rate -NOT- salary, as defined in Reg. *778.1*.

(*b*) —All straight-time MUST be paid before overtime pmt can be claimed. *778.315*.

(*c*) —Work week artificially divided into straight-time and overtime. *778.202(c)*.

(*d*) —Split-week method parallels fictitious "split-day" plan. *778.501(b)*.

(*e*) —Overtime was worked, BUT total pmt does not equal agreed salary. *778.114*.

(*f*) —No part of holiday pay may be credited toward statutory overtime. *778.219*.

(*g*) —Same principle applies to anniversary pay as to holiday pay. *778.224*.

(*h*) —Same principal applies to sick pay as to holiday pay. *778.218(a)* & *778.224*.

(*i*) —Salary reductions in short weeks indicate pmt on an hourly rate. *778.306(a)*.

(*j*) —Regular rate (778.108) is NOT the overtime rate *778.110(a)*.

**§207. Maximum hours**

(a)(1) Except as otherwise provided in this section, no employer shall employ any of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

## LIST OF PLAINTIFFS

| | | |
|---|---|---|
| Arturo Artiles | Luis Armenteros | Salvador Iglesias |
| Julio Fuentes | Gabriel A. Infiesta | Jose Navarjo |
| Carlos J. Reyes | Edelio Galindo | Nicolas Castillo |
| Jorge R. Bermeosolo | Francisco Almaquer | Pedro Casanugua |
| Pedro Rodriguez | Lonnie J. Marshall | Jose R. Suarez |
| Manuel Fernandez | Roberto Fernandez | Gervasio Llorente |
| Carl J. Brinson | Lasaro Riestra | John Shuler |
| Raul Navarro | Felipe Hernandes | Luis E. Hernandez |
| Carlos Castro | Oliden Lobez | Timoteo H. Garcia |
| Edward C. Stewart | Delfin Guanche | Miguel Abosaid |
| Sergio L. Ibanez | Hilario Lopez | Alberto Nuno |
| Steve L. Carroll | Roberto Garcia | Nicholas A. Romano |
| Jose Suarez | Humberto Sabina | Enrique Santana |
| Angel Alvarez | Osvaldo Ortega | Julio Fornes |
| Alberto L. Rigua | Guillermo Hernandez | Efrain M. Figueredo |
| Marty Pilafian | Jim D. Sherman | Felton L. Wells |
| Irvin Johnson | Benjamin Wright | Roberto Cruz |
| Larry D. Williams | Jorge L. Romero | Miguel Hondal |
| Andres Canino | Pedro Avila | Jorge Santiesteban |
| Edgar Young | Alphonso Cunningham | J. R. Alvarez |
| Guido Almeida | Robert Porter | Juan Garcia |